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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 622

BRANDYWINE-MAIN LINE RADIO, INC.,
licensee of radio stations WXUR and
WXUR-FM, Media, Pennsylvania
and
FAITH THEOLOGICAL SEMINARY, INC.,
owner of 100% of the Stock of
Brandywine-Main Line Radio Inc.,
Media, Pennsylvania, *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brandywine-Main Line Radio, Inc., licensee of radio stations WXUR and WXUR-FM, Media, Pennsylbania and Faith Theological Seminary, the owner of 100 per cent of the stock of Brandywine-Main Line Radio, Inc., (hereinafter referred to as Petitioners) pray that a writ of certiorari issue to review the deci-

sion of the United States Court of Appeals for the District of Columbia Circuit, dismissing their petition to Review and Set Aside on constitutional grounds, an Order of the Federal Communications Commission (hereinafter referred to as the Commission) directing a hearing on renewal of the Radio Broadcasting Licenses requested by Petitioners.

JURISDICTION

The Judgment of the Court below dismissing the Petition to Review was entered without opinion on May 18, 1967. (Record 53) The Order denying, without opinion, the Petition for a Rehearing *en banc* was entered June 19, 1967. (Record 65) The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit was invoked under the provisions of Section 402(a) of the Communications Act of 1934 as Amended. 47 U.S.C.A. 402(a), Section 10(e) of the Administrative Procedure Act of 1946 5 U.S.C.A. 1009(c), 1009(e) and 5 U.S.C.A. 1032. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 5 U.S.C.A. 1040.

QUESTIONS PRESENTED FOR REVIEW

1. Should the Court below have considered and passed upon the question as to whether the exceptions to the doctrine of Exhaustion of Administrative Remedies are applicable in this case?

2. Should the Court below have considered and passed upon the constitutional questions raised in the Petition to Review and Set Aside the Commission's Order of January 25, 1967?

3. Should the Court below have considered and passed upon the constitutionality of the "Fairness

Doctrine" as first promulgated by the Commission in its Report in the *Matter of Editorializing by Broadcast Licensees,* 13 FCC 1246 (1949) and its Public Notice of July 1, 1964 *Applicability of the Fairness Doctrine in Handling of Controversial Issues of Public Importance:* 29 Fed. Reg. 10415 (1964).

4. Should the Court below have considered and passed upon the constitutionality of Section 315(a) of the Communications Act of 1934, 73 Stat. 557, 47 U.S.C. 315(a)?

5. Is the Commission a proper forum to consider and decide constitutional questions of the magnitude herein presented?

6. Should the Court below have considered and decided whether the specification of the issues set forth in the Commission's Order of January 25, 1967 involving the "Fairness Doctrine" constitutes an unconstitutional exercise of its power to hear and determine and is beyond the authority delegated to it by the Congress and therefore in conflict with Article 1 of the Constitution. If such power is assertedly delegated to the Commission, does the 1959 Congressional amendment of Section 315(a) of the Communications Act of 1934 as amended violate the First, Fifth, Ninth and Tenth Amendments to the Constitution?

7. Should the Court below have considered and decided whether or not the challenged issues were unconstitutionally imposed?

8. Should the Court below have considered and decided whether the Commission's Rules requiring the publication in the press and the broadcasting of the issues set forth in the Commission's Order of January 25, 1967 was a denial of due process by holding Peti-

tioners up to scorn, ridicule and approbrium on the accusations of wrong doing contained in that Order prior to a hearing thereon causing Petitioners irreparable harm and injury?

9. Should the Court below have considered and decided whether or not Petitioners would be harmed by being forced to participate in the hearing before the Commission on issues which Petitioners believe to be unconstitutionally imposed?

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS[1]

Constitutional Provisions

Article I.
Amendments I, V, IX and X.

Statutes

Title 47 U.S.C.A. Communications Act of 1934, as amended:
Section 311(a)(1) and (2)
Section 315
Section 326
Section 402

Federal Communications Commission Rules and Regulations

Fairness Doctrine, F.R., Part II, Vol. 29, Number 145 page 10425, July 25, 1964. (in pertinent part).

Commission's Public Notice, July 26, 1963, FCC 63-734, 25 Pike & Fischer Radio Reg. 1899 (1963).

Section 1.594, Pike and Fischer Radio Reg., page 51:317.

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[1] Text is set forth in the appendix.

PROCEEDINGS BELOW

Petitioners herein, on May 3, 1966 filed with the Federal Communications Commission applications for the renewal of the licenses of Petitioners' radio stations WXUR and WXUR-FM to operate at Media, Pennsylvania.

On January 25, 1967, the Federal Communications Commission (hereinafter referred to as the Commission) entered an Order designating these applications for an evidentiary hearing on the issues therein set forth (Record 8-13).

On February 23, 1967, Petitioners filed in the United States Court of Appeals for the District of Columbia Circuit, a Petition to Review and Set Aside, on constitutional grounds, (the unconstitutionality of the Commission's "Fairness Doctrine"), the Commission's Order referred to above. (Record 1-7) On March 31, 1967 the Commission moved the Court below to dismiss the Petition on the following grounds: (Record 14-25)

1. That the Order is interlocutory and not final.
2. That Petitioners have not exhausted their administrative remedies.
3. That even if the "Fairness Doctrine" is unconstitutional Petitioners misrepresented their intention to adhere to it as a condition of the granting of their original license.
4. That the Commission is a proper forum to hear and determine the constitutional claims asserted in the Petition to Review.
5. There is no impending harm to Petitioners by virtue of the Order.

6. By consenting to a hearing Petitioners waived their constitutional claims.

Petitioners, on April 14, 1967, responded to each of the above points. (Record 33-52)

On May 18, 1967 the Court below granted Respondent's (Commission's) motion to dismiss the Petition to Review and Set Aside and dismissed the Petition in a per curiam Order on the basis of point No. 2 above, citing *Myers* v. *Bethlehem Shipbuilding Co.,* 303 U.S. 41 (1938) (Failure to Exhaust Administrative Remedies). (Record 53)

On May 31, 1967 Petitioners filed a Petition for Rehearing *en banc* seeking a more complete opinion, particularly some explanation as to why the Court did not consider that the case fell within the exceptions to the doctrine of Exhaustion of Administrative Remedies. (Record 54-64)

On June 19, 1967, the Court below denied the Petition for Rehearing *en banc* without opinion. (Record 65)

In its Petition to Review and Set Aside the Order of the Commission of January 25, 1967, designating for hearing Petitioners' applications for renewal of their licenses to operate radio stations WXUR and WXUR-FM at Media, Pennsylvania, filed in the Court below, Petitioners challenged the constitutional authority of the Commission to proceed with a hearing on issues involving the Fairness Doctrine on the grounds that:

(a) The adoption by Congress of the Commission's "Fairness Doctrine" in the amendment of 1959 constitutes an unconstitutional delegation of Congress' legislative function.

(b) The "Fairness Doctrine" is unconstitutionally vague, indefinite, uncertain and lacks the precision required when legislation which affects the basic freedoms guaranteed by the "Bill of Rights" is adopted.

(c) The "Fairness Doctrine" infringes upon the rights guaranteed by both the Ninth and Tenth Amendments to the Constitution.

(d) The "Fairness Doctrine" as interpreted and applied by the Commission violates those clauses of the First Amendment prohibiting an establishment of religion and protecting the right to the free exercise thereof.

(e) The "Fairness Doctrine" violates the First and Fifth Amendments by conditioning the granting or renewal of a broadcasting license, as in the instant case, on adherence to the Commission's ruling in Cullman Broadcasting Co., Inc., 25 Pike & Fischer, R.R. 895 (1963).

(f) Section 1.594 of the Commission's Rules which requires that the hearing order herein be published by being broadcast over the station's facilities violates the due process clause of the Fifth Amendment and results in irreparable harm.

STATEMENT OF THE CASE

On or about July 15, 1966 the Greater Philadelphia Council of Churches and various other religious and civic organizations filed a letter with the Federal Communications charging that "the programming of that [Petitioners'] station ever since it was taken over by its present licensee has been extremely one-sided, unbalanced and weighted on the side of extreme right-

wing radicalism. The result has been that on most controversial public issues, the station has represented only one side—the extreme right radical viewpoint—and has failed to apply to those issues a 'reasonable standard of fairness and impartiality'."

The letter went on to say that Petitioners' stations had been monitored for one week and an analysis was made of the programs broadcast during that week. This subjective analysis purported to classify the programs and the time devoted to them as follows:

1. Extreme right wing programming: 570 minutes, or 11%.
2. Extreme left wing: no minutes, or 0 percent.
3. Conservative programming: 375 minutes, or 7.2%.
4. Liberal programming: no minutes or 0 percent.
5. (a) Religious programs without political overtones: 1,215 minutes, or 23.1%.

   (b) Religious programs espousing the extreme right wing point of view; 1,215 minutes, or 2.9%. [Obvious error in either the minutes or percentage].

   (c) Religious programming espousing the political conservative point of view: 300 minutes, or 5.8%.
6. Anti-Semitic programming: 15 minutes or 0.3%.
7. Anti-Minority: 15 minutes, or 0.3%.
8. News, music, human interests, etc.: 2,750 minutes, or 53.4%.

The letter charged that Petitioners' stations thus violated the Commission's Fairness Doctrine and re-

quested the Commission to deny Petitioners' application for the renewal of licenses of its stations WXUR and WXUR-FM; or, if this is not the conclusion of the Commission, that Petitioners (the signers of the letter) be permitted to intervene and be heard in the proceeding; and that the matter be set down for an early hearing.

On or about August 13, 1967, Petitioners, through their attorney advised the Commission that they would participate in a hearing based upon the complaint hereinabove described.

The Commission, on January 25, 1967, entered an Order designating for hearing the renewal applications of WXUR and WXUR-FM on the following issues: (Record 8-13 at pp. 11, 12; Record 26-32 at pp. 29, 30)

It is Ordered, That, pursuant to Section 309(e) of the Communications Act of 1934, as Amended, the above-captioned applications Are Designated For Hearing to be held at Media, Pennsylvania, at a time to be specified in a subsequent Order, upon the following issues:

(1) To determine what efforts the applicant has made to ascertain the needs and interests of the public served by its stations during the licensed period;

(2) To determine what the applicant has done to serve the needs and interests of the public served by its stations during the licensed period;

(3) To determine whether the applicant failed to inform the Commission fully of its program plans in connection with its applications for ac-

quisition of control of stations WXUR and WXUR-FM.

(4) To determine whether the applicant has complied with the Fairness Doctrine and Section 315 of the Act by affording reasonable opportunity for the discussion of conflicting views on issues of public importance during its licensed period.

(5) To determine whether during its licensed period the applicant has complied with the personal attack principle of the Fairness Doctrine by furnishing copies of pertinent tapes, continuities or summaries to persons or groups attacked, with specific offers of the stations' facilities for responses, where discussions of controversial public issues have involved personal attacks;

(6) To determine whether during its licensed period the applicant has utilized its stations to serve the sectarian and political views of its principals and to raise funds for their support rather than to serve the community generally and to serve impartially all the various groups which make up the community.

(7) To determine whether the applicant in connection with its application for transfer of control of stations WXUR and WXUR-FM misrepresented to the Commission its program plans, its intent to comply with the Fairness Doctrine, and its intent regarding the discharge of its obligations to serve the community generally and the various groups which make up the community, rather than its private sectarian, politi-

cal and fund raising interests and whether it misrepresented to the public during its licensed period its intent to comply with the [Fairness] Doctrine.

(8) To determine whether in the light of all the evidence a grant of the applications for renewal of the licenses of stations WXUR and WXUR-FM would serve the public interest, convenience and necessity.

After the Commission issued its Order designating for hearing the applications for renewal of licenses of stations WXUR and WXUR-FM, and after considering the enlarged issues, the applicant re-examined its position, and sought additional legal advice. As a result of such advice, Petitioners filed in the United States Court of Appeals for the District of Columbia Circuit, a Petition to Review and Set Aside the Commission's Order of designation on constitutional grounds. (Record 1-7)

Upon Motion of the Commission to dismiss the Petition to Review and Set Aside the Commission's Order of Designation filed in the Court below, (Record 14-25) that Court in a per curiam Order dismissed the Petition, apparently on the grounds of failure to exhaust administrative remedies, (Record 53) citing *Myers* v. *Bethlehem Shipbuilding Co.*, 303 U.S. 41 (1938).

A Petition for Rehearing *en banc* (Record 54-64) was denied by the Court below without opinion. (Record 65)

ARGUMENT

Exhaustion of Administrative Remedies

The dismissal by the Court below of Petitioners' Petition To Review and Set Aside the Commission's Order of January 25, 1967, designating Petitioners' applications for an evidentiary hearing on the issues therein set forth, is not consistent with that Court's treatment of *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission and the United States of America,* U.S. App. D.C., F.2d , (Slip Opinion) Case No. 19,938, decided June 13, 1967.

In that case the Court below, on November 22, 1966, dismissed the Petition for Review of an Action of the Federal Communications Commission for failure of Petitioners to exhaust their administrative remedies, with a dissenting opinion by Judge Fahy, citing *Isbrandtsen Co.* v. *United States,* 93 U.S. App. D.C. 293, 297, 211, F.2d 51, 55; *Brigham* v. *FCC,* 276 F.2d 828 (5th Cir.); cf. *Frozen Foods Express* v. *United States,* 351 U.S. 40.

The question there presented was whether letters from the Commission to Petitioners dated October 6, 1965 and December 9, 1965, setting forth its position on legal questions and requesting Petitioners to advise the Commission of its plans to comply with the "Fairness Doctrine" was a final order subject to judicial review. The Court held that the declaratory ruling contained in the Commission's letters was not an order from which an appeal may be taken or judicial review sought and that the Court had no jurisdiction to entertain the Petition.

Thereafter the United States and the Federal Communications Commission petitioned for an *en banc* re-

hearing of the case and a majority of the Court voted in favor of granting the petition for rehearing, voted to vacate the opinions and judgment filed by the panel on November 22, 1966 and directed the assigned division to consider the case on its merits. This in effect was a holding that the letters from the Commission to the Petitioners, in that case, Red Lion Broadcasting Co., Inc., and Reverend John M. Norris, the president and principal stockholder thereof, constituted an order of the Commission subject to judicial review.

The Fairness Doctrine has been applied by the Commission with the force and effect of a Rule which the Commission has adopted with finality. This is final agency action. Petitioners in challenging the right of the Commission to hold a hearing on issues involving the Fairness Doctrine, challenged the constitutionality of the Doctrine itself and they are entitled to a judicial determination as to the Commission's constitutional authority to hold a hearing on such issues.

Frozen Food Express v. *United States,* 351 U.S. 40, 45.

United States v. *Storer Broadcasting Co.,* 351 U.S. 192, 200.

Abbott Laboratories v. *Gardner,* U.S. , 18 L. Ed. 2d 681, 87 S. Ct , Case No. 39, decided May 22, 1967.

Isbrandtsen Co. v. *United States,* 93 U.S. App. D.C. 293, 297, 211 F.2d 51, 55.

It is submitted that the Commission's Order of January 25, 1967, designating for hearing the renewal applications of radio stations WXUR and WXUR-FM is subject to judicial review and should have been so reviewed and decided by the Court below. *Isbrandtsen Co.* v. *United States, supra. Leedom* v. *Kyne,* 258 U.S. 184.

The Commission's Application of the Fairness Doctrine Exceeds Its Statutory Authority

1. Section 315(a) of the Communications Act of 1934, as amended, deals primarily with the requirement that broadcast licensees afford equal time to legally qualified candidates for public office with the four exceptions set forth therein relating to appearances by legally qualified candidates on (1) bona fide newscasts, (2) bona fide news interviews, (3) bona fide news documentaries and (4) on-the-spot coverage of bona fide news events. It further provides that "Nothing in the foregoing sentence shall be construed as relieving broadcasters in connection with the presentation of newscasts, news interviews, news documentaries and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford *reasonable opportunity* for the discussion of conflicting views on issues of public importance." (Emphasis added).

Section 315(b) provides that "The charges made for the use of any broadcast station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes."

Section 315(c) provides that: "The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section."

In *Red Lion* the Court concluded at page 41 "47 U.S.C. Section 315 (1962) adopted the Commission's Fairness Doctrine as set forth in the Commission's 1949 *Report supra,* and in so doing, the Congress did not commit an unconstitutional delegation of its legislative function".

But Section 315 provides only that licensees must afford *reasonable opportunity* for the discussion of conflicting views on issues of public importance.

It is submitted that Section 315 is not an adoption of the Doctrine, at least insofar as that section purports to confer upon the Commission the authority to require a licensee who broadcasts a controversial program involving an attack upon an individual or an organization, to transmit the text of the broadcast to the person or group, wherever they may be located, either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response, free of charge if the individual or organization so attacked is able but unwilling to pay for the time.

This assumed authority over-reaches the statute and extends "reasonable opportunity" beyond the limits of Article 1 of the Constitution.

It would seem also that Section 315(b) prohibiting a broadcast station from making charges for any of the purposes set forth in Section 315, in excess of charges made for comparable use of such station for other purposes, negates any Congressional intent that a station must provide time without charge, unless the original broadcast to which time for a reply is requested was made without charge.

The licensee of stations WXUR and WXUR-FM offered and continues to offer the facilities of these stations equally to all who wish to be heard on "issues of public importance" on the same terms and conditions, i.e. equal time at charges no higher than those charged by the stations for other purposes.

The Commission in violation of Article 1 of the Constitution has exceeded the powers delegated to it by the Congress in requiring a broadcast station licensee to make time available, without charge, to an individual or organization, desiring to reply to a broadcast, if such individual is unwilling to pay for the time at no greater charge than that made by the station for the original broadcast. This is despite the fact that the responding individual or organization may be financially able to pay for the time.

Red Lion Broadcasting Co. Inc. v. *Federal Communications Commission and United States of America,* supra. Fairness Doctrine 25 Pike and Fischer Radio Regulations 1899 (1963); *Cullman Broadcasting Co., Inc.,* 25 Pike and Fischer Radio Reg. 895.

Petitioners submit that the Commission's application of the Fairness Doctrine so as to require the furnishing of free time to an individual or organization wishing to respond to a broadcast constitutes an unconstitutional exercise of a subsidiary administrative policy not sanctioned within the prescribed statutory framework of the Communications Act of 1934, and in particular, Section 315 thereof.

The Commission's Application of the Fairness Doctrine Violates Article I of the Constitution

If the Commission has authority under Section 315 of the Communications Act of 1934, as amended, to require a broadcast licensee to furnish its facilities without charge to individuals or organizations desiring to respond to a broadcast, even though such individual or organization is financially able to pay for the time, then Section 315 is in conflict with the First Amendment to the Constitution.

Censorship

The Commission's exactment of a commitment from an applicant, prior to the grant of a license, that he will abide by the Fairness Doctrine constitutes censorship and a prior restraint contrary to Section 326 of the Communications Act of 1934, as amended, and the First Amendment.

In *American Broadcasting Company* v. *FCC,* 110 F.Supp. 374, 389, affirmed *FCC* v. *American Broadcasting Co.,* 347 U.S. 284, the three judge District Court, in discussing the Commission's Rules relating to "give away" programs held that the Rules, in part, insofar as they go beyond the scope of Section 1304 of the Criminal Code may be considered as a form of "censorship" and to that extent they would be in violation of the First Amendment.

In *Red Lion* supra, the Court recognized that any type of Government censorship imposed prior to permitted publication is an abrogation of first amendment guarantees, citing *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495. *Schneider* v. *State,* 308 U.S. 147, 161 (1939). *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936).

The Court went on to say:

> "Similarly a licensing program operating in fact as a censorship program constitutes a first amendment violation."

Petitioners, in order to protect themselves from charges of violation of the Fairness Doctrine must perforce censor all scripts in advance. The Commission has made it clear that the licensee, with the ap-

proval of the Commission is entitled to censor, in advance, the scripts of broadcasts proposed to be made.

The Commission, in response to a complaint, has stated (Record 63):

> "If a licensee feels that with respect to Dr. McIntire's or anyone else's broadcast, it is necessary for him to see a script prior to broadcast, the licensee would be acting within his rights, and properly exercising his discretion, pursuant to the Communications Act."

See also the Commission's letter to the Honorable Oren Harris, Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, dated September 20, 1963, 3 Pike & Fischer Radio Regulations, 2nd 163, 167.

But Section 326 of the Communications Act not only prohibits the Commission itself from exercising censorship, but also prohibits it from promulgating or fixing any regulation which interferes with the right of free speech.

This is precisely what the Commission has done in the application of the Fairness Doctrine.

The Commission Cannot Require a Hearing on Unconstitutional Issues

Petitioners do not challenge the right of the Commission to hear and determine the matters set forth in issues number (1), (2) and (3) of its Order of January 25, 1967. Issues (4), (5), (6) and (7) raise questions involving the Fairness Doctrine, and the religious and political views of Petitioners.

Petitioners insist that by offering equal time at equivalent rates, they have complied with the Fair-

ness Doctrine insofar as it may be constitutionally applied.

However, the imposition of issues involving the Fairness Doctrine as construed by the Commission consitutes a violation of Article I of the Constitution and particularly the First and Fifth Amendments thereof.

Issues numbered (6) and (7) involve restrictions on the licensees' expressions of religious and political views and are likewise repugnant to the First and Fifth Amendments.

Freedom of the Press as Applied to Radio Broadcasting

This Court has held that:

> "We have no doubt that moving pictures, like newspapers and radio are included in the press whose freedom is guaranteed by the First Amendment."

United States v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166. In *American Broadcasting Company* v. *United States*, 110 F. Supp. 374, 389, affirmed *FCC* v. *American Broadcasting Company*, 374 U.S. 284, the case first came before a three judge District Court in the Southern District of New York which held:

> "Broadcasting and television are entitled to the protection of the First Amendment to the Constitution, guaranteeing freedom of speech and of the press" citing *United States* v. *Paramount Pictures, Inc., supra.*

However, this Court in affirming the decision of the Court below, did not allude to the constitutional question of freedom of speech and freedom of the press.

This Court has never squarely passed upon the First Amendment guarantee of freedom of the press as applied to radio broadcasting; and, in particular, the Court has never passed upon the constitutionality of the Fairness Doctrine which places prior restraints upon broadcast licensees and requires a course of conduct not imposed upon the press.

Prior restraints, and the requirement of furnishing free space to anyone editorially attacked in the press cannot be applied to the press. If radio broadcasting is entitled to the protection of the First Amendment guaranteeing freedom of the press, prior restraints and the requirement to afford free time to one who wishes to reply to a broadcast cannot be constitutionally imposed upon a broadcast licensee.

The argument of scarcity of frequencies for broadcasting stations and their unavailability to everyone desiring to establish a radio or television station is countered by the appalling expense of establishing a newspaper which makes it economically impossible for everyone who so desires to establish a newspaper.

The Court should judicially notice the decline in the number of newspapers published in the United States and the proliferation of radio and television broadcasting stations in the country.

If the First Amendment prohibits abridgment of the freedom of the press it should apply with equal force to any abridgment of that same freedom as applied to broadcasting stations.

The Requirement of the Commission's Rule, Section 1.594 Requiring the Publishing and Broadcasting of Hearing Issues Is Repugnant to the Due Process Clause of the Fifth Amendment.

Petitioners under the above Rule were required to include in the text of the broadcasting of the Notice of the hearing the issues set forth in the Commission's designation order of January 25, 1967. When the issues contain charges, as they do in issues numbered 3 and 7, of dereliction on the part of the licensee, in failing to inform the Commission fully of the applicant's program plans in the acquisition of its stations and misrepresentations to the Commission, the publishing thereof holds the applicant up to scorn, ridicule and opprobrium in his community and causes irreparable harm and injury.

It is submitted that this requirement of publication, before hearing, of charges of such a serious nature will inevitably poison the future relations between the station and the community it serves.

In *International Union of Electrical, Radio and Machine Workers, et al.* v. *National Labor Relations Board,* Case No. 20,302 (slip opinion), in the United States Court of Appeals for the District of Columbia Circuit, decided September 6, 1967, the Court struck down the Board's requirement that an employer read a cease and desist order, issued by the Board, to its employees on Company time, stating:

> "The ignominy of a forced public reading and a 'confession of sins' by an employer, any employee or any union representative makes such remedy incompatible with the democratic principles of the dignity of man."

The forced publication of issues designated by the Commission impugning the candor and honesty of the licensee is equally "incompatible with the democratic principles of the dignity of man" and is in conflict with the due process clause of the Fifth Amendment.

CONCLUSION

In conclusion, it is submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Constitutional Provisions

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall . . . . be deprived of life, liberty, or property, without due process of law; . . .

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Statutes

Title 47 U.S.C.A. Communications Act of 1934, as amended
Section 311.

(a) When there is filed with the Commission any application to which section 309(b)(1) applies, for an

instrument of authorization for a station in the broadcasting service, the applicant—

(1) shall give notice of such filing in the principal area which is served or is to be served by the station; and

(2) if the application is formally designated for hearing in accordance with section 309, shall give notice of such hearing in such area at least ten days before commencement of such hearing.

The Commission shall by rule prescribe the form and content of the notices to be given in compliance with this subsection, and the manner and frequency with which such notices shall be given.

Section 315. Candidates for public office; facilities; rules

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presenta-

tion of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provision of this section.

Section 326. Censorship.

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Regulations

Fairness Doctrine, F.R. Part II, Vol. 29, Number 145, page 10425, July 25, 1964. (in pertinent part)

Indeed, since 1959 the Communications Act has affirmed the fairness doctrine with respect to the broadcast licensee who permits the use of his facilities for the presentation of controversial public issues. In the 1959 Amendment to Section 315 of the Act, Congress specifically affirmed the fairness doctrine by providing that:

"Nothing in the foregoing sentence (i.e. exemption from equal time requirements for news-type programs) shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate

in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

The legislative history of this amendment establishes that this provision "is a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934" (House Rept. No. 1069, 86th Cong., 1st Sess., August 27, 1959, p. 5). As shown by the use of the word "chapter" rather than "section" and also by the legislative history (ibid., Sen. Rept. No. 562, 86th Cong., 1st Sess., pp. 13, 19; 105 Cong. Rec. 16310, 16346-47; 17778, 17830-31), Congress made clear that the obligation of fairness is applicable to all broadcasts dealing with controversial issues of public importance. Thus, just as Section 315 prior to 1959 imposed a specific statutory obligation upon the licensee to afford "equal opportunities" to legally qualified candidates for public office, since 1959 it also gives specific statutory recognition to the doctrine that requires the licensee "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance", i.e. to be fair in the broadcasting of controversial issues.

Federal Communications Commission Public Notice, July 26, 1963, FCC 63-734.

25 Pike & Fischer Radio Reg. 1899 (1963)

(a) When a controversial program involves a personal attack upon an individual or organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response, (Clayton W. Mapoles, 23 Pike & Fischer RR 586, 591; Billings Broadcasting Company, 23 Pike & Fischer RR 951, 953).

FCC Rules and Regulations, Pike & Fischer Radio Reg., pp. 51:317-51:320

Section 1.594 Local notice of designation for hearing

(a) Except as otherwise provided in paragraph (c) of this section, when an application subject to the

provisions of Section 1.580 (except for applications for stations in the international broadcast service and for television translator stations) is designated for hearing, the applicant shall cause to be published a notice of such designation as follows: Notice shall be published at least twice a week, for 2 consecutive weeks within the 3-week period immediately following release of the Commission's order specifying the time and place of the commencement of the hearing, in a daily newspaper of general circulation published in the community in which the station is located or proposed to be located: . . .

(b) When an application which is subject to the provisions of Section 1.580 and which seeks modification, assignment, transfer, or renewal of an operating broadcast station is designated for hearing (except for applications for stations in the international broadcast service and for television translator stations), the applicant shall, in addition to publishing a notice of such designation as provided in paragraph (a) of this section, cause the same notice to be broadcast over that station at least once daily on 4 days in the second week immediately following the release of the Commission's order specifying the time and place of the commencement of the hearing. In the case of television broadcast stations and non-commercial educational television broadcast stations, such notice shall be broadcast orally with camera focused on the announcer. The notice required by this paragraph shall be broadcast during the following periods:

(1) . . .

(2) For standard and FM broadcast stations, between 7:00 a.m. and 10:00 a.m., but if such stations do not operate during those hours, then between 6:00 p.m. and 9:00 p.m.

(3) . . .

(4) . . .

(c) . . .

(d) The notice required by paragraphs (a) and (b) of this section shall set forth:

(1) the name of the applicant or applicants designated for hearing

(2) the call letters, if any, of the station or stations involved, and the frequencies or channels on which the station or stations are operating or proposed to operate

(3) the time and place of the hearing

(4) the issues in the hearing as listed in the Commission's order of designation for hearing.

(5) a statement that a copy of the application, amendment(s), and related material are on file for public inspection at a stated address in the community in which the main studio is maintained or is proposed to be located.

(e) When an application for renewal of license is designated for hearing, the notice shall contain the following additional statements:

(1) immediately preceding the listing of the issues in the hearing:

The application of this station for a renewal of its license to operate this station in the public interest was tendered for filing with the Federal Communications Commission on .... After considering this application, the Commission has determined that it is necessary to hold a hearing to decide the following questions:

(2) immediately following the listing of the issues in the hearing:

The hearing will be held at ....., commencing at ....., on ....., 19... Members of the public who desire to give evidence concerning the foregoing issues should write to the Federal Communications Commission, Washington, D. C. 20554, not later than ....., 19... Letters should set forth in detail the specific facts concerning which the writer wishes to give evidence. If the Commission believes that the evidence is legally

competent, material, and relevant to the issues, it will contact the person in question.

NOTE: In subparagraph 2 of this paragraph, the applicant shall insert, as the date on or before which members of the public who desire to give evidence should write to the Commission, the date 30 days after the date of release of the Commission's order specifying the time and place of the commencement of the hearing.

(f) . . . .

(g) . . . .

(h) . . . .

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 622

BRANDYWINE-MAIN LINE RADIO, INC., ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

Petitioners seek review of the court of appeals' dismissal of a petition for review of a Commission order designating their application for renewal of certain broadcasting licenses for an evidentiary hearing. That court acted properly, and no issue of general importance is presented. Review by this Court is thus not warranted.

On March 17, 1965, the Federal Communications Commission approved the transfer of control of Brandywine-Main Line Radio, Inc., licensee of radio stations WXUR and WXUR-FM, located at Media,

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Pennsylvania, to Faith Theological Seminary, Inc.[1] This approval was made over the objection of various civic and religious organizations and individuals who claimed that the Reverend Carl McIntire, President of the Board of Directors of Faith Theological Seminary, Inc., made false and misleading statements in radio programs and publications, and did not possess the requisite qualifications to operate a radio station in conformance with the Commission's Fairness Doctrine.[2] In approving the stock transfer, the Commission noted that the transferee had specifically represented in response to one of the questions on the Commission's application form that " '[e]qual opportunity will be afforded to opposing viewpoints on controversial public issues * * *'." *Brandywine-Main Line Radio, Inc.*, 4 Pike & Fisher R.R. 2d 697, 700.

On May 3, 1966, Brandywine-Main Line Radio, Inc. filed with the Commission an application for renewal of its broadcast licenses for the period August 1, 1966, to July 31, 1969. Thereafter, on July 19, 1966, a petition to intervene and to deny or to set the renewal applications for hearing was filed by the Greater

[1] *Brandywine-Main Line Radio, Inc.*, 4 Pike & Fischer R.R. 2d 697.

[2] The Fairness Doctrine places licensees under a general obligation (1) to devote a reasonable portion of broadcast time to the discussion of controversial issues of public importance, and (2) in doing so, to be fair—that is, affirmatively to endeavor to make their facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented. See 47 U.S.C. 315(a); *In the matter of Editorializing by Broadcast Licensees*, 13 F.C.C. 1246; *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415.

Philadelphia Council of Churches, which represented nineteen civic and religious groups, many of whose members resided in the WXUR listening area. The petition alleged that, subsequent to the transfer of control to Faith Theological Seminary, Inc., WXUR had carried unbalanced programming which presented only one viewpoint on controversial issues of public importance, and that WXUR had not abided by its representations and promises made to the Commission.

On August 12, 1966, Brandywine-Main Line Radio, Inc. submitted an answer denying the charges made against it but noting that "the applicant consents to the petitioners' requests for an evidentiary hearing and their request for full status as parties to such hearing" (R. 49).

By Memorandum Opinion and Order released January 25, 1967, the Commission, pursuant to 47 U.S.C. 309(e), designated the renewal applications of stations WXUR and WXUR–FM for an evidentiary hearing. Based upon the pleadings and its own investigation, the Commission found that substantial questions had been raised as to whether the applicant had made misrepresentations to the Commission in the earlier transfer application and whether the applicant was complying with the Commission's Fairness Doctrine (see Pet. 9–11).

On February 23, 1967, petitioners in the instant case sought to have the hearing order set aside. The court below granted the Commission's motion to dismiss in a *per curiam* order dated May 18, 1967, citing *Myers* v. *Bethlehem Shipbuilding Co.*, 303 U.S. 41. A petition for rehearing *en banc* was denied without opinion on June 19, 1967.

Under 28 U.S.C. (Supp. II) 2342, the courts of appeals have jurisdiction to review "final orders" of the Commission. An order designating a matter for hearing is merely preliminary or procedural and is not a "final order." *Federal Power Commission* v. *Edison Co.*, 304 U.S. 375. The order for an evidentiary hearing here imposes no obligations or penalties, neither forbids nor compels conduct, and denies no applications. In short, it has absolutely no present impact on petitioners.[3] Therefore, that order plainly lacks the requisite finality for judicial review. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 152–154; *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, 55 (C.A.D.C.), certiorari denied *sub nom. Japan-Atlantic & Gulf Conference* v. *United States*, 347 U.S. 990.[4]

Moreover, as the court below indicated, the facts of this case make completely applicable "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*

[3] By operation of law, petitioners are permitted to continue operating WXUR and WXUR-FM until the Commission determines whether to grant or to deny the renewal applications, 47 U.S.C. 307(d); 5 U.S.C. (Supp. II) 558. Petitioners' contention (Pet. 21) that the required broadcasting of a more statement of the hearing issues, pursuant to the Commission's rules, would subject them "to scorn, ridicule and opprobrium," is patently frivolous.

[4] Contrary to petitioners' contention (Pet. 12–13), *Red Lion Broadcasting Co. Inc.* v. *Federal Communications Commission*, (No. 19,938, C.A.D.C., decided June 13, 1967), is inapposite. There the Commission directed the petitioners to take action to remedy a Fairness Doctrine violation. The order for a hearing here has no such direct impact upon petitioners.

303 U.S. 41, 50–51. This principle has been repeatedly applied to attempts to enjoin the holding of a hearing, even where constitutional questions are presented to the agency. *E.g., Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752.[5] There is no reason why the same principle should not be applied here. Petitioners will have ample opportunity to present their contentions, first to the Commission, and then, if the Commission's decision is adverse to them, to the court of appeals.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

HENRY GELLER,
General Counsel,
Federal Communications Commission.

OCTOBER 1967.

[5] Petitioners' contentions that certain constitutional issues (Pet. 16–22) and questions relating to the Commission's statutory authority under 47 U.S.C. 315 (Pet. 14–16) are necessarily presented by this case are clearly premature. At the hearing the Commission will also consider the question whether petitioners misrepresented their intent in agreeing to afford equal opportunity to opposing viewpoints on controversial issues. A finding adverse to petitioners on this aspect of the proceeding might in itself lead to petitioners' disqualification and denial of the license renewal applications, without reaching the constitutional or statutory issues relating to the Fairness Doctrine sought to be raised presently by petitioners. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223; *Lorain Journal Company* v. *Federal Communications Commission*, 351 F. 2d 824 (C.A.D.C.), certiorari denied *sub nom. W.W.I.Z., Inc.* v. *Federal Communications Commission*, 383 U.S. 967; *Robinson* v. *Federal Communications Commission*, 334 F. 2d 534 (C.A.D.C.), certiorari denied, 379 U.S. 843.

U.S. GOVERNMENT PRINTING OFFICE: 1967